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No. 87-333

In the Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC., PETITIONER

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

ROGER J. MARZULLA
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
RAYMOND B. LUDWISZEWSKI
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

15 P

QUESTION PRESENTED

Whether the Port Authority of New York and New Jersey, which operates three major airports in the New York City area, may limit the distance of flights into and out of one of those airports under the "proprietary powers" reserved to it by 49 U.S.C. App. 1305(b)(1).

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

The Port Authority of New York and New Jersey, which functions pursuant to an interstate compact between the two states, operates the three major commercial airports serving the New York City area, Kennedy International Airport, Newark International Airport, and LaGuardia Airport. The Port Authority is required to operate these airports as a unified system. N.J. Stat. Ann. § 32:1-35.1 (West 1963); N.Y. Unconsol. Law § 6631 (McKinney 1979). Since the 1950's, the Port Authority has had a "perimeter rule" in effect at LaGuardia, the smallest of the three airports. Until 1984, the perimeter rule was informal and prohibited non-stop flights into or out of

LaGuardia to or from points more than 2,000 miles from the airport. In 1984, following a study, the Port Authority instituted a formal 1,500-mile perimeter rule but "grandfathered" service to Denver, which is more than 1,600 miles from LaGuardia. Pet. App. 2a, 14a. The Port Authority "believes that business travelers create considerably less airport congestion than vacationers" and instituted the perimeter rule "to encourage the use of LaGuardia by business people, who often make relatively short trips, and the use of Newark and Kennedy for vacation flights" (*id.* at 20a).

In March 1986, petitioner[1] obtained several "slots" at LaGuardia through a lottery conducted pursuant to regulations promulgated by the Federal Aviation Administration (FAA).[2] Petitioner, which has operated between Kennedy and its hub at Salt Lake City International Airport for a number of years, sought permission from the Port Authority to operate non-stop commercial flights between LaGuardia and Salt Lake City. Since Salt Lake City is nearly 2,000 miles from LaGuardia, the Port Authority denied permission, relying on its perimeter rule. Pet. App. 1a-3a.

Petitioner then instituted this action, alleging that the Port Authority's perimeter rule is contrary to 49 U.S.C. App. 1305(a)(1), which provides that no state or interstate agency may enforce any rule "relating to rates, routes, or services of any air carrier." The district court concluded

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[1] This case was initially brought by Western Air Lines, Inc. In 1987, Western merged into Delta Air Lines, Inc.

[2] The FAA restricts the number of flights into and out of four "High Density Traffic Airports," including LaGuardia, through the use of slots. Each slot authorizes the airline to perform one take-off or landing at the airport during a designated half-hour period. See 14 C.F.R. 93.211-93.227.

that the rule "may be fairly characterized as a regulation touching this area" (Pet. App. 7a). However, the court concluded that the Port Authority's perimeter rule is a valid exercise of its proprietary powers under 49 U.S.C. App. 1305(b)(1), which provides that nothing in Section 1305(a)(1) shall be construed to limit the right of any state or interstate agency that owns and operates an airport "to exercise its proprietary powers and rights." With respect to the meaning of Section 1305(b)(1), the district court first noted that in *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), this Court struck down a municipal ordinance that imposed a curfew on jet traffic at a privately-owned airport. The Court held that the ordinance, which was designed to limit aircraft noise, was preempted by federal aircraft noise regulations, but noted that it was not deciding "what limits, if any, apply to a municipality as a proprietor" of an airport (*id.* at 635-636 n.14). The district court then rejected petitioner's argument that Congress intended Section 1305(b)(1) to allow airport proprietors to regulate airport noise only, explaining that "Section 1305(b)(1) does not expressly limit proprietary powers to the regulation of noise, although presumably Congress would have so limited the section if that is what it had in mind" (Pet. App. 9a). The district court concluded that a "proprietor's interest in regulating ground congestion at its airports would appear to be at the core of proprietor's function as airport manager, perhaps even more so than the regulation of noise; and the ability of a proprietor such as the Port Authority to allocate air traffic in its three airport system is important to the advancement of this interest" (*id.* at 10a).

The court also noted that in *City of Houston* v. *FAA*, 679 F.2d 1184 (5th Cir. 1982), the court upheld the perimeter rule at Washington National Airport. While

Section 1305 did not apply in that case because the FAA (not a state or local agency) operated National at that time, the court in *City of Houston* recognized that the FAA justified its perimeter rule as an exercise of its proprietary right, as the owner of National and Dulles International Airport, to manage congestion problems at National (679 F.2d at 1193-1194). The district court here stated that "as in *City of Houston,* there is in issue a multi-airport system. The effect of the perimeter rule in each case is to divert air traffic from one airport to another within the respective systems, not to close down metropolitan area runways to all air traffic to or from points outside the perimeter." Pet. App. 11a. The district court held that the perimeter rule, "as imposed by the Port Authority to manage congestion in a multi-airport system, * * * fits comfortably within the limited role[] which Congress has reserved to the local proprietor" in Section 1305(b)(1) (Pet. App. 12a).[3]

The court of appeals affirmed "on the basis of" the district court's opinion (Pet. App. 27a). It specifically stated that it agreed with the district court's conclusion that a perimeter rule, "at least when enacted by a multi-airport proprietor such as the Authority, falls within the

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[3] The district court also rejected the claim that the Port Authority's perimeter rule unreasonably discriminates against petitioner (Pet. App. 12a-17a). While the reasonableness of the rule to achieve its stated justification may be questionable since non-stop flights are permitted from LaGuardia to Bermuda, Nassau, and West Palm Beach even though the stated justification for the rule is that the Port Authority wants business travelers (and not vacation travelers) to use LaGuardia, petitioner has not raised that claim in its petition for a writ of certiorari (see Reply Br. 3 n.4). Accordingly, this case presents no occasion for this Court to consider the reasonableness of the Port Authority's perimeter rule, a fact-bound issue that would not warrant this Court's attention in any event.

proprietary powers of airport operators exempted from preemption by section 1305(b)(1)" (*ibid.*).

ARGUMENT

Both lower courts correctly concluded that the Port Authority, as the proprietor of three major airports serving one metropolitan area, is not preempted from imposing a perimeter rule at one of its airports. Since the decision below creates no conflict in the courts of appeals and there are very few multiple-airport proprietors, further review by this Court is not warranted.

1. It has long been the case, in the regulation of commercial aviation, that "[f]ederal control is intensive and exclusive" (*Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring)), so that most local regulation is preempted by the pervasive federal presence. That was not changed by the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. While Congress worked a fundamental change in federal regulation of the airline industry by abolishing the Civil Aeronautics Board and placing "maximum reliance on competitive market forces" (49 U.S.C. App. 1302(a)(4)), it enacted Section 1305(a)(1) as part of the Airline Deregulation Act of 1978 to prevent local regulation from filling the regulatory vacuum it created. See S. Rep. 95-631, 95th Cong., 2d Sess. 98-100 (1978); H.R. Rep. 95-1211, 95th Cong., 2d Sess. 15-16 (1978).

Petitioner contends (Pet. 12), as the district court concluded (Pet. App. 7a), that the Port Authority's perimeter rule relates directly to petitioner's "routes" since it bars aircraft leaving LaGuardia from flying directly to any point (except Denver) more than 1,500 miles from LaGuardia. The Port Authority suggests (Br. in Opp. 12-13 n.9) that "route[]" is properly defined from a city-to-city perspec-

tive rather than an airport-to-airport perspective. Under its construction of Section 1305(a)(1), the perimeter rule is not preempted because it does not affect service between Salt Lake City and New York City, but, rather, affects service between the Salt Lake City International Airport and LaGuardia Airport. Neither construction of the word "routes" is unreasonable, and the legislative history provides no guidance in determining precisely what Congress meant. Accordingly, it is not clear, under Section 1305(a)(1) alone, whether imposition of a perimeter rule by a multiple-airport proprietor is preempted.

Whether or not the Port Authority's perimeter rule relates to "routes" within the meaning of Section 1305(a)(1), it is properly viewed, in the context of a multiple-airport system, as an exercise of a proprietory power protected from preemption by Section 1305(b)(1). As the district court concluded (Pet. App. 10a), regulation of airport congestion "would appear to be at the core of the proprietor's function as airport manager." Accord *Midway Airlines* v. *County of Westchester,* 584 F. Supp. 436 (S.D.N.Y. 1984). Reasonable steps taken to relieve congestion are therefore within the scope of the powers preserved by Section 1305(b)(1). In a multiple-airport context, imposing restrictions that reduce congestion at a busy airport in order to encourage use of a less crowded airport may be a reasonable way to relieve congestion. When the FAA operated National and Dulles airports, it imposed a 1,000-mile perimeter rule at National to minimize congestion there and to stimulate growth at Dulles, and justified its rule as an exercise of its proprietary powers. The FAA stated that it had "long recognized that an airport proprietor with control of two or more airports serving the same area can take reasonable actions to determine the nature of service provided at one airport so long as the

proprietor's other airports remains available to accommodate fully the other types of operations." 46 Fed. Reg. 36076 (1981).[4]

2. Petitioner primarily argues that the courts below erred because Congress, in enacting Section 1305(b)(1), intended that the proprietary powers protected from preemption would be strictly limited to regulations relating to noise or other potential sources of direct financial liability for the airport operator. Because "[t]he Port Authority makes no argument that it could be liable for allowing long-distance non-stop flights into LaGuardia" (Reply Br. 5), petitioner contends that the perimeter rule is beyond the Authority's proprietary powers.[5] Congress

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[4] While petitioner notes (Reply Br. 1-2, 8a) that some FAA officials have questioned whether perimeter rules ought to be authorized, even in cases involving multiple-airport proprietors, the decision below does not conflict with any official action ever taken by the FAA. Nor is petitioner correct in contending (Pet. 15-16) that the CAB, in *Southwest Airlines, Automatic Market Entry*, 83 C.A.B. 644 (1979), construed Section 1305 inconsistently with the decision here. In that case, the CAB, during the period in which it was being phased out and deregulation was being phased in, concluded that specific statutory provisions governing the interim period required it to issue a certificate authorizing Southwest Airlines to fly between Love Field in Dallas and New Orleans. In its brief discussion of Section 1305(b)(1), the CAB concluded that that general provision did not give an airport operator "veto power" over a certificate issued by the CAB pursuant to the mandatory terms of the statute (83 C.A.B. at 651-652).

[5] Petitioner also argues (Pet. i Question 3; Pet. 17) that, in addition to being preempted by Section 1305(a)(1), the Port Authority's perimeter rule is invalid on account of the FAA's slot system (see note 2, *supra*). There is no merit to that contention, which petitioner does not press. The slot system, which is designed to promote more efficient use of navigable air space by limiting the number of flights arriving and departing at certain airports during certain hours (see 50 Fed. Reg. 52181 (1985)), does not relate to the distance of flights to or from the airports and therefore does not conflict with the perimeter rule.

did not draft Section 1305(b)(1) in a way that suggests that it intended it to be limited as petitioner proposes. If it had intended merely to allow airport owners to take steps to avoid liability, particularly liability resulting from aircraft noise, then, rather than broadly preserving "proprietary powers and rights" from preemption, Congress presumably would have drafted the provision more narrowly than it did. Moreover, it seems clear that Congress did not intend such a narrow construction. For example, parking restrictions might affect the routes airlines fly since an airline might decide not to fly to popular vacation spots from a particular airport that lacked inexpensive long-term parking. But Congress plainly did not intend to preempt proprietors from regulating airport parking, even though no liability attaches to proprietors on account of parking regulations.[6]

Nothing in the legislative history of the Airline Deregulation Act suggests that Congress, in preserving proprietary rights and powers, had in mind the narrow meaning petitioner suggests. Indeed, the legislative history, like the words of the statute, supports a contrary conclusion. The provision preserving proprietary powers

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[6] The adoption of noise restrictions by airport proprietors raises additional legal questions. Unlike other exercises of proprietary powers, local noise regulation must not only survive preemption under Section 1305(a)(1), but also must avoid running afoul of the comprehensive federal scheme of aircraft noise regulation found in the Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234, and the Aviation Safety and Noise Abatement Act of 1979, Pub. L. No. 96-193, 94 Stat. 50. An airport operator's ability to regulate noise has been understood to be grounded upon the need to mitigate its potential financial liability under *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). *San Diego Unified Port District* v. *Gianturco*, 651 F.2d 1306, 1317 (9th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); *British Airways Board* v. *Port Authority*, 558 F.2d 75, 83 (2d Cir. 1977); cf. *City of Burbank*, 411 U.S. at 633, 635-636 n.14.

was in the House bill but not in the Senate bill.[7] Following action by the Conference Committee, which included the proprietary powers provision in the bill it produced (H.R. Conf. Rep. 95-1779, 95th Cong., 2d Sess. 4 (1978)), members of each house engaged in a colloquy in which the questioner asked whether the bill would affect the "long recognized powers of the airport operators to deal with noise and other environmental problems at the local level." 124 Cong. Rec. 37419 (1978) (statement of Sen. Kennedy); *id.* at 38526 (statement of Rep. Markey). Senator Cannon responded that "[i]t was not the intent of the Senate conferees to limit in any way the normal exercise of the existing proprietors' powers to place nondiscriminatory restrictions on the operations at an airport" (*id.* at 37419-37420). Similarly, Representative Anderson stated that "[i]t was not the intent of the House conferees to limit in any way the normal exercise of a proprietor's powers to determine the level and nature of service to be provided at airports" (*id.* at 38526). These statements, while not focused on the precise question presented here, are contrary to the narrow construction of Section 1305(b)(1) proposed by petitioner. Neither spokesman for the conferees suggested that the provision authorized noise regulation only or otherwise indicated an understanding

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[7] While the Senate bill did not include an express provision preserving proprietary powers in its preemption provision (S. Rep. 95-631, *supra*, at 39-40), the Senate Report stated that the prohibition against "regulations that affect routes, rates, fares, or charges should not be construed to affect or limit existing proprietary rights of airport operators to manage, operate, or regulate airports" (*id.* at 99). The House bill contained an express proprietary powers provision (H.R. Rep. 95-1211, *supra*, at 40), although the House Report did not comment on it (*id.* at 15-16).

that it had the limited effect of permitting only regulations that are designed to avoid liability.[8]

3. In any event, review is not warranted because the decision below, which is expressly limited to cases involving "a multi-airport proprietor such as the Authority" (Pet. App. 27a), involves a question of extremely limited applicability. In addition to New York City, only Los Angeles (Los Angeles International Airport and Ontario Airport), Houston (Houston Intercontinental and Hobby Airport), Chicago (Midway Airport and O'Hare International Airport), and Washington (National and Dulles) are served by multiple-airport proprietors. Washington is not affected by the question presented here because Congress, in transferring authority over National and Dulles from the FAA to a local agency, imposed a 1,250-mile perimeter rule on National. Metropolitan Washington Airports Act of 1986, Pub. L. No. 99-591, § 6012, 100 Stat. 3341-388.[9]

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[8] Contrary to petitioner's contention (Pet. 11-12), the decision here does not conflict with the statement in *San Diego Unified Port District* v. *Gianturco*, 651 F.2d 1306, 1317 (9th Cir. 1981), cert. denied, 455 U.S. 1000 (1982), that before an entity may regulate air[port] noise "it must bear the responsibility, either actual or potential, for excessive aircraft noise." That statement is addressed to the legally distinct context of aircraft noise regulation, which, as we have noted (note 6, *supra*), is pervasively regulated by the federal government. Moreover, that case did not involve a multiple-airport proprietor and the court did not even cite Section 1305(b)(1).

[9] Petitioner errs in suggesting (Pet. 14-15 n.20) that Congress's imposition of a perimeter rule at National Airport indicates its understanding that the proprietor could not adopt such a rule. In the absence of congressional action, the proprietor might or might not have imposed a perimeter rule, or might have imposed a different rule. Congress's action shows that it wanted to be sure that a 1,250-mile perimeter rule would be in effect at National. It further suggests, contrary to petitioner, that Congress does not perceive perimeter rules, in the context of multiple-airport operators, to be contrary to the scheme it has established to govern the nation's air service.

The physical limitations of Houston Hobby and Chicago Midway—neither of which would be capable of handling long-range, non-stop flights unless existing runways are lengthened into densely populated areas—make the adoption of formal perimeter rules there highly unlikely. Since there is no indication that any other proprietor is likely to impose a perimeter rule, this decision is unlikely to have any significant impact upon the national air transportation system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Acting Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General
PETER R. STEENLAND, JR.
RAYMOND B. LUDWISZEWSKI
Attorneys

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